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Supreme Court, U.S.
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No. 95-1749

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

EDWARD F. HEIL,

Petitioner,

v.

BENNETT S. LEBOW, ROBERT DAVIES, WILLIAM WEKSEL, and BROOKE PARTNERS, L.P

Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the trial court can find that an omission is not material as a matter of law and thereby deprive plaintiff of due process and a jury trial when (1) plaintiff alleged that defendants intended to and did mislead the market as to the circumstances under which a share of stock could be converted to 100 million shares, and (2) defendants submitted evidence only to the effect that the misleading statement was allegedly literally true.

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OPINIONS BELOW

The United States District Court for the Southern District of New York entered an opinion and order granting summary judgment in favor of defendants on November 14, 1994, which opinion is unreported and appears in the appendix at pages A1-29.

The district court entered an order denying plaintiff's motion for rehearing on April 18, 1995, which order is unreported and appears in the appendix at A30-34.

The United States Court of Appeals for the Second Circuit entered an order denying plaintiff's appeal on December 12, 1995, which order is unreported and appears in the appendix at pages A35-40.

The United States Court of Appeals entered an order denying plaintiff's petition for rehearing on January 18, 1996, which order is unreported and appears in the appendix at A41.

JURISDICTIONAL STATEMENT

The court of appeals affirmed the judgment of the district court on December 12, 1995 and denied petitioner's petition for rehearing on January 18, 1996. Jurisdiction of this Court is proper under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

Seventh Amendment:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .

STATEMENT OF THE CASE

Plaintiff, Edward Heil, who purchased over 4 million shares of the common stock of Western Union, brought this section 10(b)-5 action for securities fraud against the former chairman of the board of Western

Union, two insider directors, and their partnership.

The gist of plaintiff's complaint was that defendants had purchased a share of Class B common stock for $25 million that could be converted into 100 million shares if Western Union met an earnings test providing that the share could be converted "immediately following the end of the fiscal year of net income in excess of the preferred dividend requirement . . . ."

Defendants conspired to mislead the market place into believing that the $25 million that was used to purchase the share was actually at risk so that the fortunes of the shareholders and defendant were inextricably intertwined and dependent on defendants turning the company around and producing operating earnings.

Instead, defendants had a "secret plan" to write down assets and subsequently sell them to create extraordinary gains and

convert the share without ever turning Western Union around or producing any operating earnings. In fact, when they converted the share, Western Union had suffered over $70 million in operating losses.

Notably, in their motion for summary judgment, defendants did not produce any evidence to refute the allegation of a "conspiracy" or a "secret plan" or that the "market was misled." Defendants' entire argument was simply that since "net income" technically encompassed extraordinary earnings, the test was literally true.

The district court granted defendants' motion for summary judgment on November 14, 1994 and denied plaintiff's motion for reconsideration on April 18, 1995. A notice of appeal was timely filed on May 17, 1995. The court of appeals therefore had jurisdiction under 28 U.S.C. § 1291.

The court of appeals affirmed in a summary order rejecting plaintiff's arguments "for substantially the same reasons offered by the district court in its well-reasoned opinion granting summary judgment." (App. at A-39.) In point of fact, Judge Keenan never even addressed in his memorandum opinion and order the issue of whether summary judgment could be granted when defendants had not produced any evidence refuting the material allegations of the complaint that defendants (1) omitted to state that the test could be satisfied by extraordinary earnings, and (2) misled the market into believing that Western Union would have to be returned to profitability before the share could be converted.

REASONS FOR GRANTING THE WRIT

Plaintiff believes that this Court should grant a writ of certiorari to correct a manifest injustice that has permitted a rank raconteur to reap tens of millions of

dollars and dilute the value of Western Union's common stock by 50% solely for his own benefit without ever earning a single dollar of operating earnings for the company.

The district court opinion turns Celotex Corp. v. Catrett, 477 U.S. 317 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), on their head by requiring the non-movant to produce evidence on all matters of the complaint even if the movant presented no evidence to refute those allegations, which practice is directly contrary to this Court's decisions in Celotex, Anderson, and Matsushita.

In addition, the district court's order and the opinion of the Second Circuit erode plaintiff's right to have a jury decide whether defendants' omission to state that the "earnings test" could have been

satisfied without any earnings whatever was a fraud on the marketplace. Certainly plaintiff was misled, as was Robert Leventhal (the previous Chairman of the Board of Western Union and now the Dean of the Graduate School of Business at the University of Washington) and an analyst at Kemper which purchased over $15 million of Western Union bonds.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

Michael J. Rovell,
Counsel for Petitioner

No. _____

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APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD F. HEIL,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	91 Civ. 8656 (JFK)
	:	OPINION and ORDER
BENNETT S. LEBOW,	:	
ROBERT DAVIES,	:	
WILLIAM WEKSEL and	:	
BROOKE PARTNERS,	:	
L.P.,	:	
	:	
Defendants.	:	

APPEARANCES:

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JOHN F. KEENAN, United States District Judge

JOHN F. KEENAN, United States District Judge:

Before the Court is the motion of defendants for summary judgment dismissing plaintiff's Amended Complaint, pursuant to Fed. R. Civ. P. 56. Plaintiff opposes this motion. For the reasons that follow, the motion is granted.

BACKGROUND

Plaintiff Edward H. Heil (hereinafter "Heil") is a common stockholder of New Valley Corporation, formerly known as Western Union Corporation (hereinafter "WUC"). New Valley is now in Chapter 11 bankruptcy.

Heil acquired his shares in WUC in open-market transactions from May 1989 to January 1990. In his Amended Complaint, plaintiff states claims for alleged violations of section 10(b) of the Securities Exchange Act of 1934 and section 12 of the Illinois Securities Law of 1953,

as amended, and for common law fraud. Heil contends that WUC's controlling stockholder, defendant Brooke Partners, improperly schemed with the individual defendants to cause conversion of their single share of WUC "super common" stock into more than 79 million shares of ordinary common stock.

Defendants acquired the share of "super common" stock in 1987 as part of a restructuring of old Western Union Corporation (hereinafter "old WUC") and Western Union Telegraph Company (hereinafter "WUTCO") into WUC which the defendants effected. Defendant LeBow helped to raise $500 million of debt financing for the restructuring. A company controlled by LeBow contributed $25 million in new equity, for which it received a single share of "super common" stock--specifically, WUC Class B Convertible Common Stock. By its terms, the "super common" share was convertible in certain circumstances into as

much as 51 percent of the common stock of WUC. Until converted, the "super common" share voted together with the common stock of WUC and was entitled to a number of votes equal to the number of common shares into which it was convertible. The "super common" share was also entitled to dividends paid to common stockholders on a ratable basis.

The public filings for the 1987 restructuring disclosed the proposed text of the restructuring agreement and the plan of merger. The Restructuring Proxy Statement and a November 20, 1987 supplement to it explained the changes to be made in classes and numbers of shares of common and preferred stocks:

> The holders of the Class B Common Share shall have the right at their option, to convert such share into Common Shares commencing on the January 1 immediately following the end of the fiscal year in which the Corporation achieves one full fiscal year of net income in excess of preferred dividend requirements (as

> reflected in the audited year-end published financial statements of the Corporation computed in accordance with generally accepted accounting principles); provided, however, that the Class B Common Share may not be so converted prior to July 2, 1989, and subject further to the following terms and conditions....

Restated Certificate of Incorporation, as amended, Proxy Supplement, Hirschfeld Aff., Ex. B, at 4. The share became convertible on January 1, 1991, as WUC had a net income in excess of the preferred dividend requirements for the fiscal year ending December 31, 1990. While initially convertible into 100,000,000 shares, the "super common" share was converted into 79,399,254 common shares on January 1, 1991 under the various adjusting provisions.

Heil alleges that, notwithstanding the explicit terms of the conversion test disclosed in the public filings that allowed the above conversion, he and the market were led to believe that the "super common" share would only be able to be converted if WUC

returned to profitability. Heil believed that the "earnings test" for the conversion could only be satisfied through a dramatic increase in operating earnings. Heil alleges that when defendants recognized the difficulty of satisfying the "earnings test" in a legitimate manner, they conspired to satisfy the "earnings test" through paper profits without enhancing operating earnings of WUC and the value of the common shares. Plaintiff alleges that assets were written down and sold at a paper profit which would enable the conversion while WUC continued to experience operating losses.

Plaintiff filed this action in the Northern District of Illinois in December 1990. On October 31, 1991, the Illinois Court transferred the action to the Southern District of New York. Defendants answered and then moved, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings dismissing plaintiff's claims. On January

13, 1993, in an Opinion and Order, this Court dismissed plaintiff's request for declaratory relief under the Securities Exchange Act section 14(a) and plaintiff's claim for breach of fiduciary duty. The parties proceeded with discovery, and after discovery, defendants made this motion for summary judgment seeking to dismiss plaintiff's remaining claims.

DISCUSSION

Plaintiff's remaining claims include claims for alleged violations of section 10(b) of the Securities Exchange Act of 1934 and section 12 of the Illinois Securities Law of 1953, as amended, and for common law fraud. Defendants contend that plaintiff withstood dismissal of these remaining claims in the January 13, 1993 Opinion and Order by asserting, at oral argument on that motion, that defendants had made misleading oral statements about the conversion terms during presentations to potential investors.

Plaintiff alleges that the context in which the conversion test was presented made the literal language of the test misleading.

Defendant moves for summary judgment on the following grounds: 1) plaintiff has no evidence of any written or oral misstatement or deliberate omission by defendants to the effect that gains from sources other than WUC's continuing operations would not be considered in the computation of net income under the conversion test necessary to support his section 10(b) claim; and 2) the state law claims must also fail because his claim based on section 12 of the Illinois Securities Law of 1953 parallels section 10(b), and his common law fraud claim relies on the federal securities fraud claim, which must fail.

I. SUMMARY JUDGMENT STANDARDS

This court may grant summary judgment only if there is no genuine dispute as to any material fact and the moving party is

thus entitled to judgment as a matter of law. See, e.g., Silver v. City University of New York, 947 F.2d 1021, 1022 (2d Cir. 1991); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987); Falls Riverway Realty, Inc., v. Niagara Falls, 754 F.2d 49, 54 (2d Cir. 1985). The role of the Court on such a motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d at 11. See, e.g., Twin Lab. Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990); Montana v. First Fed. Sav. & Loan Ass'n, 869 F.2d at 103; Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 465 (2d Cir. 1989).

The movant bears the initial burden of informing the Court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, "that show the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the movant meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. Id.; see also Silver v. City University of New York, 947 F.2d at 1022; Greater Buffalo Press, Inc. v. Federal Reserve Bank, 866 F.2d 38, 42 (2d Cir.) cert. denied, 490 U.S. 1107 (1989). The opposing party may not solely rely on its pleadings, on conclusory factual allegations or on conjecture as to the facts that discovery might disclose. See, e.g., Gray v. Darien, 927 F.2d 69, 74 (2d Cir.), cert.

denied, 112 S. Ct. 170 (1991). Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. See, e.g., Celotex Corp. v. Catrett, 477 U.S. at 324; Twin Lab. Inc. v. Weider Health & Fitness, 900 F.2d at 568; Montana v. First Fed. Sav. & Loan. Ass'n, 869 F.2d at 103; Knight v. U.S. Fire Ins. Co., 804 F.2d at 12; L & L Started Pullets, Inc. v. Gourdine, 762 F.2d 1, 3-4 (2d Cir. 1985). To show such a "genuine dispute," the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp, 475 U.S. 574, 586-87 (1986); Cinema North Corp. v. Plaza at Latham Assoc., 867 F.2d 135, 138 (2d Cir. 1989). If "the party opposing summary judgment propounds a reasonable conflicting interpretation of a material

disputed fact," then summary judgment must be denied. Schering Corp. v. Home Ins. Co., 712 F.2d 4, 9-10 (2d Cir. 1983) (citing New York State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc., 666 F.2d 787, 790 (2d Cir. 1981)).

II. SECTION 10(b) CLAIM

A. Elements of a Section 10(b) Claim

In order to establish a claim for relief under Section 10(b) and Rule 10b-5 promulgated thereunder, a plaintiff must prove that "in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material misrepresentation or omitted to disclose material information and that plaintiff's reliance on defendant's action caused [plaintiff] injury." ZVI Trading Corp. Employees' Money Purchase Pension Plan & Trust v. Ross (In re Time Warner Inc. Sec. Litig.), 9 F.3d 259, 264 (2d Cir. 1993), quoting Bloor v. Carro, Spanbock, Londin,

Rodman & Fass, 754 F.2d 57, 61 (2d Cir. 1985)), cert. denied, 114 S.Ct. 1397 (1994). In this case, plaintiff is proceeding under the "fraud on the market" theory set forth in Basic Inc. v. Levinson, 485 U.S. 224 (1988), in order to dispense with the need to show individual reliance. The "fraud on the market" theory is based on the idea that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business...Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements..." Basic, 485 U.S. at 241-42. Because the market does rely on misstatements in conjunction with all other available information, it is presumed to act like a reasonable investor. Id.

B. Analysis

The first element disputed here is whether defendants in fact either made any false material representation or omitted to disclose material information. It is also disputed whether the market relied on the alleged misrepresentation or omission.

Plaintiff contends that defendants made numerous affirmative material misrepresentations to the investing public. In addition, plaintiff contends that the literally true language of the conversion test was made misleading through omission. Defendants, on the other hand, contend that the undisputed record supports their assertion that the terms of the conversion test were fully disclosed in the public filings accompanying the restructuring and therefore plaintiff cannot maintain a section 10(b) claim.

This Court finds that the record establishes that the conversion test was

accurately set forth in the Restructuring Proxy and its supplement. Plaintiff concedes this.

The Court further finds that the undisputed record illustrates that the "super common" share was converted in conformity with the publicly disclosed terms. Plaintiff also concedes this point. What remains to be determined is whether defendants promised, either through a misstatement or an omission, to return WUC to operating profitability prior to the conversion, and whether the market relied on any such misrepresentation or omission.

1. Misrepresentation?

Plaintiff alleges that numerous misrepresentations were made directly to the investing public. First, plaintiff points to the following statements in the October 1987 Prospectus as misleading:

> (1) "Western Union believes that the Plan of Reorganization provides the opportunity to revitalize Western

> Union's telecommunications business and restore Western Union to profitability."

Prospectus, Hirschfeld Aff., Ex. A., at 6, 25.

> (2) "The combined effect of [the savings from consolidation of operations] and the decrease in future cash obligations resulting from the restructuring transactions is expected to increase significantly the cash flow from operations of the combined enterprise."

Id. at 8. Defendants argue that these statements only declare that the restructuring offered the opportunity for survival and the expectation of increased cash flow. Neither statement promises profitability. Indeed, the Prospectus continues, after the second above statement, with the admonition that "there can be no assurance that such cost savings or increased cash flow will be achieved." Id. In addition, the Court notes that the statements express the views of old WUC and WUTCO--entities of which defendants were not a part.

The Court does not believe that either of these statements is a misrepresentation upon which a federal securities law claim can be predicated. Neither expresses a promise--rather, both statements express the hopes and expectations for the restructuring.

Plaintiff next points to the following statements made in WUC annual reports to support his securities law claim.

> It was clear from the beginning that achieving the goals of the restructuring plan would entail difficult decisions and require forceful actions, both operational and financial. However, it was also clear that their achievement was essential to turning Western Union around from its unprofitable position as a facilities-based operator of domestic telecommunications transmission services to a new role as a leading international provider of electronic messaging, financial and other value-added services in the business and consumer markets.

1988 Annual Report, Hirschfeld Aff., Ex. D, at 313. The 1990 Annual Report states that the unexpected decrease in telex business

coupled with high interest expense "has prevented the Company from reaching the point of profitability and has left it unable to support the fixed charges imposed by its current capital structure." 1990 Annual Report, Plaintiff's Ex. 3, at 3.

The Court finds that neither of these statements is a misrepresentation for federal securities law purposes. Neither makes the alleged promise to return to profitability that plaintiff is relying on.

Plaintiff next states that projections of profitability were injected into the market place by defendants when they presented their "roadshow"[1] to potential investors. At the roadshow, LeBow was

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[1] A "roadshow" is typically an in person presentation to and discussion with securities dealers and prospective institutional and other large investors, arranged generally by the underwriters of a new issue of equity or debt securities. At such a roadshow, representatives of the issuer and underwriter provide background information and answer questions about the issuer and the securities.

portrayed as the savior of corporations like WUC for whom the death knell was ringing. See Videotape of roadshow, Plaintiff's Ex. 4. At the roadshow, LeBow was hailed as a turn-around specialist with an outstanding track record who intended to transform WUC. See id.

Again, none of the taped presentation rises to the level of a misrepresentation supportive of a federal securities law claim. Again, a statement of intention to return WUC to profitability is not a statement of fact upon which the market can justifiably rely. The various disclosures by WUC and defendants that are cited by plaintiff (including descriptions of LeBow's successful investment history) do not constitute a promise to return WUC to operating profitability. Plaintiff does not produce any evidence that the market perceived these disclosures as a promise of profitability.

Finally, plaintiff argues that Robert Leventhal, the Chairman of the Board of old WUC at the time of the restructuring, had conversations with LeBow in which LeBow stated an intention to return WUC to profitability. See Leventhal Declaration, Ex. 5, ¶ 2-3. Leventhal states that LeBow never told him that the conversion test could be satisfied by extraordinary asset sales to offset operating losses. See id. at ¶ 4. This Court finds that Leventhal's understanding of LeBow's intention and the requirements of the conversion test do not create actionable misrepresentations (or omissions) on the part of defendants.

Plaintiff has failed to produce evidence of misstatements to support a section 10(b) claim. The disclosures cited by plaintiff are not statements of fact. To the extent that the hopes expressed in these statements constitute statements of opinion that WUC will be returned to profitability,

they are also not actionable. Statements of opinion that express no guarantee do not support a cause of action under the federal securities laws. See, e.g., Friedman v. Mohasco Corp., 929 F.2d 77, 79 (2d Cir. 1991) (opinion of financial advisors not actionable); Frank H. Cobb, Inc. v. Cooper Cos., Nos. 89 Civ. 5323 & 89 Civ. 5892, 1992 WL 77600 (S.D.N.Y. Mar. 20, 1992) (statements about future events that are plainly expressions of opinion and not guarantees are not actionable under the federal securities laws).

In addition, certain of the disclosures also urge caution. Defendants cannot be held liable for statements which "bespeak caution," purport to be speculative, or "set forth that they are based on supplied facts, but . . . additionally state that there is no implication that the results predicated can or will be achieved." Stevens v. Equidyne Extractive Indus. 1980, 649 F.

Supp. 1057, 1064 (S.D.N.Y. 1988). See also Barrios v. Paco Pharmaceutical Servs., Inc., 816 F. Supp. 243, 250 (S.D.N.Y. 1993) (granting summary judgment in favor of defendants because "no potential investor was at liberty to conclude to the contrary of or to ignore the specifics of what was stated and represented, and believe that an investment was being made in an assured project--rather than in the candidly disclosed risky and precarious investment set forth"); Kushner v. DBG Property Investors, Inc. 793 F. Supp. 1161, 1171-72 (S.D.N.Y. 1992) (granting summary judgment because the offering memoranda's expectation of profit was "qualified with numerous warnings").

Here, the Restructuring Proxy Statement contains at least twelve pages of risk factors. See Restructuring Proxy Statement, Hirschfeld Aff., Ex. A, at 25-36. The Restructuring Proxy Statement also states

that successful implementation of the restructuring is "subject to significant uncertainties, many of which will be beyond the control of Western Union or LeBow." Id. at 27. The Proxy Statement goes on to caution that "no assurance can be given" that the restructuring goals will be attained. See id. at 15, 27, 42, 120. The Proxy Statement repeatedly refers the reader to the enumerated risk factors. See id. at 15, 42, 58, 115, 118, 120, 123. In addition, the court notes that WUC's precarious financial condition was repeatedly emphasized in the restructuring disclosures. See id. at 5-7, 45-49, 113-118, 119-127. See also Videotape of Roadshow, Plaintiff's Ex. 4.

The Court additionally notes that the third-party press reports relied on by plaintiff show the market's awareness of the risks surrounding the restructuring. See Plaintiff's Ex. 8 (expressing cautious

optimism); Plaintiff's Ex. 9 (noting that the "long melodrama of whether [WUC] will survive has been renewed at the twelfth hour for another season").

This Court therefore concludes that defendants have made no misrepresentations that are actionable under section 10(b).

2. Omission?

Heil also contends that the defendants violated the federal securities laws by omitting to state a material fact necessary in order to make the statements made in light of the circumstances under which they were made not misleading. Specifically, Heil contends that, given the hype by defendants concerning their plan to restore WUC to profitability,

> defendants had a duty to affirmatively disclose that profitability meant to them the write-down and subsequent sale of assets and other accounting gimmicks to create 'paper profits,' rather than the common everyday meaning of operational earnings, so that they could receive 100 million shares and effectively dilute

> ownership by fifty percent without not only failing to produce $1 of operating income, but by continuing to sustain staggering losses.

Plaintiff's Memorandum at 15. In the context of the oft-stated expectation of a return to profitability, "the failure to expressly state that the conversion could occur by means of extraordinary gains, rather than just operating gains, made the statements misleading." Id.

While it is true that literally true disclosures can be rendered misleading through omission, that is not the case here. Heil has failed to show any omission. First, the Court notes that "net income" in a business context is defined as the "difference between total sales and total costs and expenses." John Downes and Jordan Elliot Goodman, Dictionary of Fiance and Investment Terms 276 (3d ed., 1991). Net income is not specifically limited to just operating earnings. In addition, the Court

notes that GAAP requires that net income include extraordinary items. See J. Williams, Miller GAAP Guide at 41.03-.09 (1994), Hirshfeld Aff., Ex. G.

Finally, the Court notes that WUC has historically included "paper profits" in net income, according to GAAP requirements. See Restructuring Proxy Statement, Hirschfeld Aff., Ex. A, at 19, 20, 111, 113, 116, 117, 118 C-4, C-31, D-3, D-24, D-25, D-27, D-29. See also Proxy Statement Supplement, Hirschfeld Aff., Ex. B, at A-1, A-8, A-15, A-21. WUC's 1988 Annual Report, issued just two months before Heil began purchasing WUC common stock, contains a discussion of net income that clearly reflects inclusion of extraordinary transaction gains. See Hirschfeld Aff., Ex. D, at 9.

Other than a conclusory allegations, Heil has failed to produce any evidence that defendants formulated an intention to satisfy the conversion test through paper

profits rather than operating earnings. Even had they formulated such an intention, extraordinary transaction profits are properly included in a determination of net income. As a result, this Court finds that plaintiff has failed to produce evidence of an omission sufficient to withstand a motion for summary judgment. Plaintiff therefore cannot maintain a section 10(b) claim.

Because this Court has already determined that plaintiff cannot maintain a section 10(b) claim because he has failed to produce any evidence of either a misrepresentation or of an omission, it is unnecessary for this Court to determine if the market relied on the alleged misrepresentation or omission.

III. STATE CLAIMS

Defendants argue that the state claims must also fail. This court agrees.

A. Section 12 of the Illinois Securities Law

Heil's claim under Section 12 of the Illinois Securities Law, Ill. Comp. Stat. Ann. CH. 815, para. 5/12 (Smith-Hurd 1993), fails for the same reasons as his section 10(b) claim. The elements of a violation of Section 12 of the Illinois Securities Law "generally parallel those for a Rule 10b-5 violation." Branch-Hess Vending Servs. Employees' Pension Trust v. Guebert, 751 F. Supp. 1333, 1342 (C.D. Ill. 1990). Therefore, a finding of defects in plaintiff's 10b-5 claim are similarly fatal to the Illinois Section 12 claim. See id. Therefore, this Court also grants summary judgment in defendants' favor on the section 12 claim.

B. Common Law Fraud

Because Heil's common law fraud claim relies on and incorporates by reference his section 10(b) claim, see Complaint §§53-55, it also fails. As this Court has already amply discussed, plaintiff has failed to

produce any evidence of a misrepresentation. Misrepresentation is an essential element of a claim for common law fraud. See Citibank, N.A. v. K-H Corp., 968 F.2d 1489, 1496 (2d Cir. 1992); Indemnified Capital Invs. SA. v. R.J. O'Brien & Assocs., Inc., 12 F.3d 1406, 1412 (7th Cir. 1993). Therefore, this Court also grants summary judgment in defendants' favor dismissing the common law fraud claim.

CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is granted. The Court orders this case closed and directs the Clerk of the Court to remove it from the Court's active docket.

SO ORDERED

Dated: New York, New York
November 14, 1994

/s/
JOHN F. KEENAN
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD F. HEIL, Plaintiff,	
- against -	91 Civ. 8656 (JFK)
	MEMORANDUM OPINION and ORDER
BENNETT S. LEBOW, ROBERT DAVIES, WILLIAM WEKSEL, and BROOKE PARTNERS, L.P., Defendants.	

JOHN F. KEENAN, United States District Judge

On November 14, 1994, this Court granted the defendants' motion for summary judgment and dismissed this action. Plaintiff now moves for reconsideration of that Opinion and Order.

The standards controlling a motion for reargument pursuant to Local Civil Rule 3(j) and a motion to amend the judgment pursuant to Fed. R. Civ. P. 59(e) are the same. See Morser v. AT & T Info. Systems, 715 F. Supp. 516, 517 (S.D.N.Y. 1989). To be entitled to reconsideration, the movant

must demonstrate that the Court "overlooked" "matters or controlling decisions." See Local Civil Rule 3(j); Violette v. Armonk Assocs., L.P., 823 F. Supp. 224, 226 (S.D.N.Y. 1993)

Local Rule 3(j) and 59 (e) prohibit a party from advancing "'new facts, issues or arguments not previously presented to the court.'" In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig., 1994 U.S.Dist. LEXIS 4116, at *2 (S.D.N.Y. April 4, 1994) (quoting Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc., No. 86 Civ. 6447, 1989 LEXIS 9145, at *10 (S.D.N.Y. August 4, 1989)). See also Stein Heurtey, S.A. v.Bricmont & Assoc., Inc., 1992 U.S.Dist. LEXIS 2348 (S.D.N.Y. March 3, 1992); Morse/Diesel, Inc. v. Fidelity & Deposit Co., 768 F. Supp. 115, 116 (S.D.N.Y. 1991). The presentation of new material is precluded by the plain language of the Rule "because by definition material not

previously presented cannot have been 'overlooked' by the Court." Stein Heurtey, S.A. v. Bricmont & Assoc., Inc., 1992 U.S. Dist. LEXIS, at *3 (S.D.N.Y. March 3, 1992). See also Travelers Ins. Co. v. Buffalo Reinsurance Co., 739 F. Supp. 209, 211 (S.D.N.Y. 1990). "Rule 3(j) was not intended to advance 'the practice of a losing party examining a decision and the plugging the gaps with additional matters.'" Department of Economic Development v. Arthur Anderson & Co., 139 F.R.D. 594, 596 (S.D.N.Y. 1991) (quoting Lewis v. New York Telephone, 1986 WL 1441 (S.D.N.Y. January 29, 1986)). The purpose of Rule 3(j) is to "ensure the finality of decisions and to prevent the practice of a losing party" plugging gaps with new facts. See McMahan & Co. v. Donaldson, Lufkin & Jenrette Sec. Corp., 727 F. Supp. 833, 833 (S.D.N.Y. 1989). See also Woodard v. Hardenfelder, 845 F. Supp. 960 (E.D.N.Y. 1994).

Rule 60 gives a court discretion to relieve a party from a final judgment. Rule 60 motions are addressed to the sound discretion of the court, and should be granted "only upon a showing of exceptional circumstance." Mendell ex rel. Viacom, Inc. v. Gollust, 909 F.2d 724, 731 (2d Cir. 1990), aff'd, 501 U.S. 115 (1991); accord Shor Int'l Corp. v. Eisinger Enterprises, Inc., 90 Civ. 2353, 1993 U.S.Dist. LEXIS 15488, at *2 (S.D.N.Y. Nov. 3, 1993). "Such a high standard is required because 'public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" Shor, at *2 (quoting Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981)).

In this instance, the Court does not find that plaintiff has satisfied the

requirements of either rule 3(J) or Rule 60. This Court found in its November 14, 1994 Opinion and Order, and finds on this motion for reconsideration, that plaintiff has failed to produce evidence of a misrepresentation of omission sufficient to state a claim for securities or common law fraud. Plaintiff has failed to produce the required evidence necessary to withstand a motion for summary judgment. Plaintiff has failed to convince this Court that it overlooked any matters or controlling decisions relevant to that Opinion.

CONCLUSION

Plaintiff's motion for reconsideration is denied. The Court orders this case closed and directs the Clerk of the Court to remove it from the Court's active docket.

SO ORDERED

Dated: New York, New York
April 18, 1995

/s/
JOHN F. KEENAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the 12th day of December, one thousand nine hundred and ninety-five.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE PIERRE N. LEVAL

Circuit Judges

HONORABLE BARRINGTON D. PARKER,

District Judge**

EDWARD F. HEIL
Plaintiff-Appellant,

v. No. 95-7516
BENNETT S. LEBOW, ROBERT DAVIES, WILLIAM WEKSEL, and BROOKE PARTNERS L.P.,
Defendants-Appellees.

** Of the United States district Court for the Southern District of New York, sitting by designation.

For plaintiff-appellant:
Michael J. Rovell, Holstein, Mack & Klein, Chicago, IL

For defendants-appellees:
Michael L. Hirschfeld, Milbank, Tweed, Hadley & McCloy, New York, New York

Appeal from the United States District Court for the Southern District of New York (Keenan, J.).

This cause came on to be heard on the transcript of record from the United Stated District Court for the Southern District of new York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and hereby is AFFIRMED.

Edward F. Heil appeals from a judgment entered in the United States District Court for the Southern District of New York (John F. Keenan, Judge) dismissing his securities fraud suit against the controlling shareholder (and persons affiliated with it) of the corporation formerly known as Western Union Corporation ("Western Union"). He

also appeals from an order denying reconsideration of that judgment. Heil himself owns some four millions shares of Western Union, all purchased in the nine months between May, 1989 and January, 1990. His complaint alleged material omissions by the defendants concerning a 1987 agreement between them and Western Union (the "Agreement") had fraudulently inflated the value of these shares at the time he purchased them.

The Agreement was described in a combined prospectus and proxy statement, as allowing the defendants to convert their single share of Western Union stock, purchased for $25 million, into up to 100 million shares if and when Western Union's net income for a fiscal years, computed in accordance with generally accepted accounting principles, exceeded preferred dividend requirements. In 1991, Western Union had such a banner year. Although it

suffered considerable operating losses, those losses were more than offset by extraordinary gains resulting from asset sales and debt retirement. The defendants converted their single share into some 79 million shares, acquiring control over the company in the process. Thereafter, Western Union was forced into involuntary bankruptcy.

Heil alleged that investors had reasonably believed that the defendants could convert their share under the Agreement only if Western Union returned to operating profitability. Under Heil's construction of the Agreement, notwithstanding generally accepted accounting principles, "paper profits," e.g., from the sale of assets in excess of the assets' book value or the retirement of debt at a discount, did not count. The district court disagreed, and granted summary judgment for the defendants. It

reasoned that, under generally accepted accounting principles, "paper profits" did count under the Agreement, and that the defendants had not breached any duties under the securities laws by not stating so explicitly.

On appeal, Heil contends that material issues of fact concerning the defendants' alleged omissions, coupled with his unrebutted allegations concerning the defendants' purported "plot" to manufacture paper profits so as to seize control of Western Union under the agreement, precluded the entry of summary judgment. We disagree, for substantially the same reasons offered by the district court on its well-reasoned opinion granting summary judgment. See Heil v. LeBow, No. 91 Civ. 8656 (JFK) (S.D.N.Y. Nov. 17, 1994). We have considered all of Heil's arguments, and find them meritless.

Accordingly, the judgment of the district court is AFFIRMED.

/s/
HON. JOSEPH M. McLAUGHLIN,

/s/
HON. PIERRE N. LEVAL,

Circuit Judges

/s/
HON. BARRINGTON D. PARKER

District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Courthouse
40 Foley Square
New York 10007

At a stated Term of the United States Courthouse, Foley Square, in the City of New York, on the 18th day of January one thousand nine hundred and ninety six.

Present:
Hon. Joseph M. McLaughlin,
Hon. Pierre N. Leval,
Circuit Judges.

Hon. Barrington D. Parker,
District Judge.

95-7516 Heil v. LeBow

A petition for rehearing having been filed herein by Appellant Edward F. Heil

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

GEORGE LANGE III, Clerk

By: /s/
Beth J. Meador,
Administrative Attorney

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p/o/CD

Supreme Court, U.S.
FILED
MAY 29 1996

(3)

No. 95-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD F. HEIL,

Petitioner,

vs.

BENNETT S. LEBOW, ROBERT DAVIES, WILLIAM WEKSEL, and BROOKE PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the district court correctly granted summary judgment dismissing petitioner's securities fraud claim, where, after respondents pointed out the absence of evidence to support elements of the claim on which petitioner would bear the burden of proof at trial, petitioner (i) failed to adduce evidence sufficient to establish the existence of the alleged misrepresentations and omission and (ii) failed to offer any evidence regarding the existence of an alleged undisclosed plan or scheme, relying in this respect solely on the conclusory allegations of his complaint.

STATEMENT UNDER RULE 29.6

BGLS Inc. is the successor to Brooke Partners, L.P., a respondent herein. BGLS Inc. is a wholly-owned subsidiary of Brooke Group Ltd., a New York Stock Exchange listed and traded company. The following are nonwholly owned indirect subsidiaries or affiliates of BGLS Inc.: New Valley Corporation; Liggett-Ducat Ltd.; Ladenburg, Thalmann Group Inc.; Thinking Machines Corporation; and Empresa Brasileira de Aeronautica, S.A.

STATUTES OR REGULATIONS INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:
>
> (1) To employ any device, scheme, or artifice to defraud,
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

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No. 95-1749

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EDWARD F. HEIL,

Petitioner,

vs.

BENNETT S. LEBOW, ROBERT DAVIES, WILLIAM WEKSEL, and BROOKE PARTNERS, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In 1987, in a corporate restructuring conceived and implemented by respondent Bennett S. LeBow ("LeBow"), the financially distressed old Western Union Corporation ("Old WUC") and Western Union Telegraph Company, Inc. ("WUTCO") were merged to form new Western Union Corporation ("WUC").[1] LeBow helped raise $500 million of debt financing for the restructuring, and a company which he controlled contributed $25 million in new equity to WUC. In return, that company -- a predecessor-in-interest to respondent Brooke Partners, L.P. -- received a single Class B Common

[1] WUC changed its name to New Valley Corporation in 1991.

Share of WUC, a sort of "super common" share that was convertible in certain circumstances into as much as 100 million shares, or 51%, of ordinary WUC common stock. Until converted, the Class B Common Share voted and received dividends together with the ordinary common shares, as if already converted into ordinary common shares. (A-3 to A-4)[2]

The prospectus and proxy statement disseminated by Old WUC and WUTCO in connection with their restructuring fully disclosed the circumstances under which the Class B Common Share could be converted, involving a single condition precedent (the "Conversion Test"), as follows:

> The holders of the Class B Common Share shall have the right at their option, to convert such share into Common Shares commencing on the January 1 immediately following the end of the fiscal year in which [WUC] achieves one full fiscal year of net income in excess of preferred dividend requirements (as reflected in the audited year-end published financial statements of [WUC] computed in accordance with generally accepted accounting principles); provided, however, that the Class B Common Share may not be so converted prior to July 2, 1989, and subject further to the following terms and conditions . . . .

(A-4 to A-5) The Conversion Test was satisfied in 1990, and the Class B Common Share was converted in 1991 into 79,399,254 common shares. (A-5)

Petitioner, Edward F. Heil ("Heil"), a common stockholder of WUC who acquired his shares in open-market transactions from May 1989 through January 1990, filed this action in December 1990 alleging, *inter alia*, violations of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Section 12 of the Illinois Securities Law of 1953, as

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[2] References in this form are to petitioner's Appendix of selected portions of the record below.

amended, and common law fraud.[3] The gravamen of his complaint is that respondents improperly conspired to cause conversion of the Class B Common Share without returning WUC to operating profitability.

Petitioner concedes that the Conversion Test for the Class B Common Share, which was fully disclosed in WUC's filings with the Securities and Exchange Commission, permitted conversion without WUC attaining operating profitability. (A-14 to A-15) Nevertheless, petitioner argues, he and the market were misled into believing that the conversion of the Class B Common Share would be predicated on WUC's return to operating profitability, *i.e.*, that there could be no conversion of the Class B Common Share unless the net income to satisfy the Conversion Test had been provided by operating profits. (A-5 to A-6) Petitioner's theory is premised on an alleged "secret plan" to write down assets excessively and subsequently sell those assets at fair value, thereby creating extraordinary gains and paper profits to satisfy the Conversion Test. (A-6)

Treating *seriatim* each alleged misstatement or omission which purportedly promised a return to operating profitability before the Class B Common Share could be converted, the district court found that none were actionable under the federal securities laws. (A-15 to A-20, A-24 to A-27) In particular, the court unequivocally found that petitioner "failed to produce evidence of misstatements to support a section 10(b) claim" (A-20) and "failed to show any omission" (A-25).

The district court also expressly rejected Heil's "secret plan" theory as unsupported by any evidence: "[o]ther than conclusory allegations, Heil has failed to produce any evidence that respondents formulated an intention to satisfy the

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[3] Petitioner's request for declaratory relief under Exchange Act § 14(a) and his claim for breach of fiduciary duty, also included in his complaint, were dismissed by order of the district court on January 13, 1993. That order has not been appealed.

conversion test through paper profits rather than operating earnings." (A-26 to A-27)

On reconsideration, the district adhered to its initial decision.

The United States Court of Appeals for the Second Circuit affirmed the district court's decisions granting summary judgment in favor of respondents and dismissing the complaint. The court of appeals expressly rejected Heil's contention that his allegations regarding the purported "secret plan" are sufficient to defeat summary judgment:

> On appeal, Heil contends that material issues of fact concerning the defendants' alleged omissions, coupled with his unrebutted allegations concerning the defendants' purported "plot" to manufacture paper profits so as to seize control of Western Union under the agreement, precluded the entry of summary judgment. We disagree, for substantially the same reasons offered by the district court [i]n its well-reasoned opinion granting summary judgment.

(A-39)

ARGUMENT

I. IN GRANTING SUMMARY JUDGMENT THE DISTRICT COURT PROPERLY APPLIED *CELOTEX*, *ANDERSON* AND *MATSUSHITA* TO SHIFT THE BURDEN OF PROOF TO PETITIONER

In seeking a writ of certiorari, petitioner argues that the district court misperceived the standards elucidated in this Court's 1986 trilogy of summary judgment decisions.[4] Under those holdings, the evidentiary burden shifts to the

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[4] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

non-moving party as to those items on which the movant has pointed out an absence of evidentiary support. Petitioner suggests there was error below because the district court purportedly shifted the evidentiary burden to petitioner as to *all* elements of his claim. (Pet. at 6)[5]

Petitioner's hypothesis about the district court's actions is incorrect; indeed, it finds absolutely no support in any part of the opinions of the district court or the court of appeals, which opinions show that the courts considered only those elements of petitioner's case which respondents had shown to be deficient.

Respondents introduced evidence to show that the misstatements and omission which petitioner alleged concerning the Conversion Test simply did not exist. After considering the evidence petitioner introduced in response, the district court found, adversely to petitioner, that respondents had *not* represented that conversion of the Class B Common Share was conditioned upon a return to operating profitability. The district court also found, adversely to petitioner, that respondents had *not* omitted to state that net income to satisfy the Conversion Test could be derived from extraordinary or non-operating sources as well as operating sources, but had in fact made amply clear that income from all sources was acceptable.

With the preponderance of petitioner's argument thus disproven by the text of the district court's opinion, there remains only petitioner's contention that he should not have been required to offer any proof with respect to the existence of an alleged "secret plan." Implicit in this argument is the "factual" contention that respondents introduced no evidence in the district court to negate the existence of the alleged "secret plan," so that "legally" petitioner was entitled to rest in this regard on the conclusory allegations of his complaint.

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[5] References in this form are to Heil's Petition for Writ of Certiorari.

Both elements of this formulation are flawed. On the facts, respondents showed the district court that the asset write-downs occurred and were disclosed in 1988, before petitioner purchased his WUC shares, and that, according to his answers to interrogatories, petitioner could not specify a single WUC asset that was written down excessively. Petitioner offered no contrary evidence on the summary judgment motion, and thus failed to show that the "secret plan" caused WUC to meet the Conversion Test. In addition, respondents showed that the extraordinary earnings in 1990 which allowed WUC to meet the Conversion Test arose from the retirement of debt at a discount, rather than from the sale of assets previously written down, and that such assets as were sold in 1990 at a profit were not assets that had been previously written down. Thus, it is incorrect for petitioner to suggest that respondents did not point out the insufficiency of petitioner's evidence regarding the "secret plan."

Moreover, even if respondents had made no such showing to the district court, petitioner would have in any event borne the burden to come forward with evidence to support his allegation of a "secret plan." In light of respondent's showing that there was adequate disclosure that the Conversion Test could be satisfied by operating or non-operating earnings, the burden shifted to petitioner to show -- if he could -- that this disclosure was misleading because respondents in fact intended to satisfy the Conversion Test using only non-operating earnings. Petitioner offered no proof to this effect -- because he had none.

Thus, contrary to petitioner's assertions, under *Celotex*, *Anderson* and *Matsushita*, petitioner bore the burden of proof with respect to each element of his claim on which the district court found his evidence to be deficient, and there was no error in imposing this burden upon him.[6]

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[6] In effect, the "substance" of petitioner's position is that he disagrees with the district court's evaluation of his evidence. The instant petition for a writ of certiorari, asserts nothing more than a purported misapplication of

(Footnote continued)

II. THE DISTRICT COURT PROPERLY FOUND THAT PETITIONER FAILED TO MEET ITS BURDEN OF ESTABLISHING A MATERIAL MISSTATEMENT OR OMISSION UPON WHICH A REASONABLE INVESTOR WOULD RELY

Criticizing the result below, petitioner complains that

> defendants [did] not produce[] any evidence refuting the material allegations of the complaint that defendants (1) omitted to state that the [Conversion Test] could be satisfied by extraordinary earnings, and (2) misled the market into believing that Western Union would have to be returned to profitability before the share could be converted.

(Pet. at 5)

Petitioner argues that respondents had the burden on summary judgment of *negating* petitioner's unsupported allegations. As the district court recognized, however, this Court has expressly held that the position thus advanced by petitioner here is incorrect, stating: "we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar matters *negating* the opponent's claim." *Celotex*, 477 U.S. at 323 (emphasis in original).

Petitioner asserts that respondents' "entire argument was simply that since 'net income' technically encompassed extraordinary earnings, the test was literally true." (Pet. at 4) While this is a gross oversimplification, the fact is that when interpreting an objective financial test specifically phrased in terms of generally accepted accounting principles ("GAAP"), the "technicalities" are all-important. Respondents' proof on this issue was not limited, however, to a showing from

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a properly stated rule of law, and accordingly should not be granted. *See* S. Ct. R. 10.

authoritative sources of the meaning of the term "net income" under GAAP. Respondents also showed that this facet of GAAP's operation was revealed in WUC's public filings, including the proxy statement and prospectus in which the Conversion Test was described, and including WUC's 1988 Annual Report. (A-25 to A-26) Although it was not their burden, respondents conclusively established that they had completely and accurately disclosed the fact that the Conversion Test could be satisfied through operating and non-operating income.

The burden on the summary judgment motion thus shifted to petitioner. The district court properly found, after carefully considering all of the evidence offered by petitioner,[7] that petitioner had shown no actionable misrepresentation or omission regarding the conversion of the Class B Common Share (A-17 to A-20, A-25 to A-27) -- without which petitioner's case failed as a matter of law.

In addition, in its opinion granting summary judgment in favor of respondents, the district court expressly considered petitioner's theory that respondents embarked upon a "secret plan" to convert the Class B Common Share without returning WUC to operating profitability, and correctly found that petitioner had failed to offer any proof to support this theory. (A-3, A-6, A-26 to A-27)

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[7] In response to respondents' interrogatories, petitioner failed to identify any claimed misleading statement other than the Conversion Test.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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May 28, 1996